COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Comcast of Massachusetts III, Inc. *Complainant*, v. Peabody Municipal Light Plant and Peabody Municipal Lighting Commission *Respondents.*	)	D.T.C 14-2

JOINT MOTION OF ASHBURNHAM MUNICIPAL LIGHT PLANT, PEABODY MUNICIPAL LIGHT PLANT AND THE PEABODY MUNICIPAL LIGHTING COMMISSION FOR RECONSIDERATION OF A PORTION OF THE HEARING OFFICER'S ORDER ON HEARING PROCEDURE AND MOTION TO INTERVENE

I. INTRODUCTION

Ashburnham Municipal Light Plant ("AMLP"), Peabody Municipal Light Plant, and the Peabody Municipal Light Plant Commission (together "PMLP") hereby request that the Hearing Officer reconsider and modify that portion of the June 23, 2014 Order on Hearing Procedure and Motion to Intervene ("Order"), which limits Phase I of this proceeding to a legal inquiry only, without any consideration of factual evidence.

AMLP and PMLP's Joint Motion for Reconsideration of a Portion of the Order should be granted because the Hearing Officer's decision to exclude factual evidence from Phase I is error and that constitutes an extraordinary circumstance, which giving effect to Department precedent, provides circumstances appropriate for a motion for reconsideration. *See Petition of Comcast Cable Comm., Inc.*, D.T.C. 10-8, *Order on Reconsideration*, at 3 (Apr. 23, 2012); *Verizon Resale Tariff*, D.T.C. 06-61, *Order on Reconsideration*, at 6 (Jan. 5, 2012); *Mass. Elec. Co.*, D.P.U. 90-261-B, at 7 (Feb. 7, 1991); *New England Tel. & Tel. Co.*, D.P.U. 86-33-J, at 2 (June 23, 1989).

II. ERROR

The Hearing Officer limits Phase I to what is termed a legal question: whether the "Massachusetts Formula"[1] applies to municipal light plants and municipal lighting commissions. Order at 6. The Order concludes that this question of law "can be answered without a fact finding evidentiary inquiry." Order at 4 (emphasis added). This conclusion is error.

The factual differences and/or similarities between municipal light plants and investor owned utilities ("IOUs") is the factual predicate needed to determine, as a matter of law, whether the Massachusetts Formula applies to municipal light plants or not.

For the reasons stated below, the Hearing Officer should reconsider his conclusion that the application of the Massachusetts Formula to municipal light plants can be answered without evidence.

III. STANDARD OF REVIEW

Pursuant to 220 C.M.R. § 1.04(5)(a), an application to the Department to take any action or to enter any order after initial pleading can be made by written motion.

Motions for reconsideration of previously decided issues are granted when extraordinary circumstances dictate that the Department take a fresh look at the record for the express purpose of modifying a decision reached after review and deliberation. *Verizon Resale Tariff*, D.T.C. 06-61, *Order on Reconsideration*, at 5-6 (Jan. 5, 2012); *Western Mass. Elec. Co.*, D.T.E. 00-110-C, at 9 (2001); *North Attleboro Gas Co.*, D.P.U. 94-130-B, at 2 (1995).

An example of an extraordinary circumstance warranting reconsideration is when the treatment of an issue was the result of error. *Petition of Comcast Cable Comm. Inc.*, D.T.C. 10-18, *Order on Reconsideration*, at 3 (Apr. 23, 2013) ("One example of an 'extraordinary circumstance' is when the Department's treatment of an issue was the result of clear error."); *Verizon Resale Tariff*, D.T.C. 06-61, *Order on Reconsideration*, at 6 (Jan. 5, 2012) ("A party

[1] We do not concede that this is a Massachusetts-wide Formula because its applicability to municipal light plants has not been determined.

may argue on reconsideration that the Department's treatment of an issue was the result of mistake or inadvertence."); *Mass. Elec. Co.*, D.P.U. 90-261-B, at 7 (Feb. 7, 1991); *New England Tel. & Tel.*, D.P.U. 86-33-J, at 2 (June 23,1989).

IV. ARGUMENT

Excluding factual evidence from Phase I is error warranting reconsideration.

The applicability of the Massachusetts Formula to municipal light plants is not a pure question of law. Evidence is necessary to establish a factual predicate to the determination of whether municipal light plants are "sufficiently distinct" from IOUs to justify departure from the Massachusetts Formula. How can the Department evaluate similarities or differences between municipal light plants and IOUs that may make municipal light plants "sufficiently distinct" without evidence[2]?

Without such evidence, the Hearing Officer would not be able to evaluate the effect of:

1. The method municipal light plants use to account for expenses is different than IOU accounting.
2. Municipal light plants must recover all of their costs-to-serve each year unlike IOUs.
3. Municipal light plants are not-for-profit entities.
4. Municipal light plants are public entities subject to bidding laws and other laws.
5. Municipal light plants have no shareholders.
6. The manner in which municipal light plants set their rates is different than IOUs.
7. Budgeting is different.

[2] We are not suggesting that the Hearing Officer take evidence of specific cost-of-service calculations in Phase I. We are asserting that there are factual differences between municipal light plants and IOUs that bear on the question of whether the Massachusetts Formula should apply to all municipal light plants.

These examples are but a few of the facts needed in evidence that are directly relevant to and bear on the question of whether the Massachusetts Formula should be universally applied to municipal light plants.

If the Hearing Officer does not make a factual inquiry in Phase I, then the decision will not be supported by a "determination of each issue of fact or law necessary to that decision." *Massachusetts Inst. of Tech. v. Dep't of Pub. Utils.*, 425 Mass. 856, 868 (1997) (quoting *Costello v. Dep't of Pub. Utils.*, 391 Mass. 527, 533 (1984)). The Hearing Officer has a "duty to make adequate subsidiary findings." *Hamilton v. Dep't of Pub. Utils.*, 346 Mass. 130, 137 (1963) (quoting *Leen v. Assessors of Boston*, 345 Mass. 494, 502 (1963)).

That the Phase I inquiry is purely a legal question without the need for factual evidence is error and constitutes an extraordinary circumstance compelling the Hearing Officer to modify the Order. *See Verizon Resale Tariff,* D.T.C. 06-61*, Order on Reconsideration,* at 5-6 (Jan. 5, 2012)*; Western Mass. Elec. Co.,* D.T.E. 00-110-C, at 9 (2001)*; North Attleboro Gas Co.,* D.P.U. 94-130-B, at 2 (1995).

V. CONCLUSION

The consequences of the Hearing Officer's determination in Phase I will be significant and far-reaching. The outcome will substantially and specifically affect every municipal light plant in the Commonwealth with pole attachments.

Evidence of the similarities and differences between municipal light plants and IOUs is a necessary factual predicate to determine whether municipal light plants are "sufficiently distinct" or the same as IOUs so that the Massachusetts Formula applies to municipal light plants or does not apply as a matter of law. It is error to exclude factual evidence from Phase I. That error warrants reconsideration and modification of the Order.

Accordingly, AMLP and PMLP respectfully request that the Hearing Officer reconsider that portion of the Order asserting that Phase I be limited to a purely legal inquiry and that the Hearing Officer modify the Order so that Phase I includes the limited fact finding evidentiary

inquiry needed to address the legal question of whether the Massachusetts Formula should apply to all municipal light plants.

Respectfully submitted,

Philip T. Durkin, Esq.
BBO# 139240
27 Lowell Street
Peabody, MA 01960
978-406-4222
pdurkin@scalawyers.com

On behalf of the Peabody Municipal Light Plant and the Peabody Municipal Lighting Commission

Nicholas J. Scobbo, Jr., Esq.
BBO# 448900
Matthew C. Campbell, Esq
BBO# 687396
Ferriter Scobbo & Rodophele, PC
125 High Street, 26th Floor
Boston, MA 02110
617-737-1800
nscobbo@ferriterscobbo.com
mcampbell@ferriterscobbo.com

On behalf of the Ashburnham Municipal Light Plant

COMMONWEALTH OF MASSACHUSETTS
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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2014, I served the foregoing Joint Motion for Reconsideration of a Portion of the Hearing Officer's Order on Hearing Procedure and Motion to Intervene by electronic delivery, hand-delivery and first-class mail to the attached Service List in accordance with the requirements of 220 CMR § 1.04(5)(a) and 220 CMR § 1.05.

Nicholas Scobbo (mcc)
Nicholas J. Scobbo, Jr.

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